

Consultation on proposed amendments to the Tribunals Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009

1. The new arrangements for MPs' expenses will give important powers to the Compliance Officer for the Independent Parliamentary Standards Authority (IPSA). The First-tier Tribunal is to deal with appeals from current Members of Parliament or former Members of Parliament against certain decisions by the Compliance Officer. (Both current Members of Parliament and former Members of Parliament are referred to in this paper as MPs.) Appeals in MPs' expenses cases will be made to the Tax Chamber of the First-tier Tribunal. The main purpose of this consultation is to seek views on changes to the Tax Chamber Rules¹ in order to provide for these appeals. The consultation also seeks views on minor changes affecting all cases in the Tax Chamber².
2. This consultation document is issued by the Tribunal Procedure Committee (TPC). The TPC is the independent body that makes rules that govern practice and procedure in the First-tier Tribunal and Upper Tribunal. It is chaired by Mr. Justice Walker, who is a Judge of the High Court of England and Wales and is also President of the Administrative Appeals Chamber of the Upper Tribunal with UK-wide jurisdiction. Members of the Committee are appointed by the Lord Chancellor, the Lord Chief Justice of England & Wales and the Lord President of the Court of Session. The Lord Chancellor's appointments include a member nominated by the Administrative Justice and Tribunals Council.
3. Below you will find further information on the following:
 - (1) the First-tier Tribunal and Upper Tribunal
 - (2) background on the First-tier Tribunal, Tax Chamber
 - (3) background on the Compliance Officer and MPs' rights of appeal
 - (4) the Tax Chamber Rules and possible changes
 - (5) the consultation questions; and
 - (6) how to respond and by when

¹ Tribunals Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 SI 2009 No. 273

² Paragraphs 17, 25 and 30

4. The existing Rules used by the Tax Chamber with proposed amendments (shown as tracked changes) are at **Annex A**. The consultation questions are also in a separate Word document, which can be used for submitting your response.
5. Further information on the Tribunals Service and the Tribunal Procedure Committee can be found on the Tribunals Service website <http://www.tribunalservice.gov.uk/index.htm>

(1) The First-tier Tribunal and the Upper Tribunal

6. The Tribunals, Courts and Enforcement Act 2007 (the TCE Act) provides for the functions of various tribunals to be transferred to two tribunals established under that Act on 3 November 2008, the First-tier Tribunal and the Upper Tribunal. The First-tier Tribunal is the first instance tribunal for most jurisdictions. The Upper Tribunal mainly, but not exclusively, decides appeals from the First-tier Tribunal. It also has power to deal with judicial review cases in certain circumstances. Each of the First-tier Tribunal and Upper Tribunal is divided into separate chambers which group together jurisdictions dealing with like subjects or requiring similar skills.

The First-tier Tribunal's Chambers are:

- Social Entitlement Chamber
- Health, Education and Social Care Chamber
- War Pensions and Armed Forces Compensation Chamber
- General Regulatory Chamber
- FTT Immigration and Asylum Chamber
- Tax Chamber

The Upper Tribunal's chambers are:

- Administrative Appeals Chamber
- Tax and Chancery Chamber
- Lands Chamber
- UT Immigration and Asylum Chamber

(2) The First-tier Tribunal, Tax Chamber

7. The Tax Chamber was established in April 2009 and currently hears appeals against tax decisions made by Her Majesty's Revenue and Customs (HMRC) and certain other agencies. Appeals range from the relatively simple to the complex and may concern direct or indirect tax. The existing judiciary and members of the Tax Chamber have extensive experience of dealing with a wide range of disputes relating to finance generally and financial transactions. The tribunal is used to determining appeals that may involve complex issues of fact and the exercise of judgment in assessing the evidence, as well as adjudicating on issues of law. Judges and members have experience, for example, of considering defences of reasonable excuse in penalty cases in relation to both direct and indirect tax, provisions which have some parallel in the power of the Compliance Officer to impose penalties under the Parliamentary Standards Act 2009.
8. Appeals from decisions of the Tax Chamber go to the Tax and Chancery Chamber of the Upper Tribunal. Under the TCE Act such appeals are limited to points of law, and can only be made with permission. In the first instance an application for permission must be made to the Tax Chamber. If the Tax Chamber refuses permission then permission can be sought from the Tax and Chancery Chamber of the Upper Tribunal. Onward appeals on a point of law, with similar requirements for permission, go to the appropriate appellate court and from there to the Supreme Court.
9. The current Tax Chamber Rules seek to be flexible and practical. In order to enable the Tax Chamber to consider matters that range from the simple to the complex, they allocate cases to four procedural categories:
 - (1) Default Paper
 - (2) Basic
 - (3) Standard; and
 - (4) Complex.

(3) The Compliance Officer for the Independent Parliamentary Standards Authority

10. The Parliamentary Standards Act 2009 (the 2009 Act) established IPSA and gave it responsibility for determining and paying MPs' expenses (see the IPSA website for more information: <http://www.parliamentarystandards.org.uk/>). The 2009 Act also created the office of Commissioner for Parliamentary Investigations to investigate breaches of the expenses scheme; responsibility for taking enforcement action was left with the House of Commons and a committee of that House, the Committee on Standards and Privileges.
11. The Committee on Standards in Public Life, chaired by Sir Christopher Kelly, published a report on MPs' expenses (available at: http://www.public-standards.gov.uk/OurWork/MPs_Expenses_and-Allowances_x.html) which proposed a number of changes to the 2009 Act to strengthen the enforcement powers of IPSA. Amendments to the 2009 Act to give effect to these were made by Part 3 of the Constitutional Reform and Governance Act 2010 (the 2010 Act).
12. The amendments provide for the appointment by IPSA of a Compliance Officer to police the MPs' expenses regime (and for the abolition of the office of Commissioner for Parliamentary Investigations). They give review, investigatory and enforcement powers to the Compliance Officer in relation to MPs' expenses claims and to suspected and proven overpayments of MPs' expenses.
13. The amendments also give MPs a right of appeal to the First-tier Tribunal in the following circumstances:
 - (1) An MP may ask the Compliance Officer to review a determination by IPSA either to refuse an expenses claim or to pay only part of a claim. The Compliance Officer must decide whether or not to confirm IPSA's determination or to alter it. The MP may appeal the Compliance Officer's decision to the First-tier Tribunal (section 6A (6)-(11) of the 2009 Act).
 - (2) Under section 9 of the 2009 Act, the Compliance Officer may conduct an investigation if he or she has reason to believe that an MP has been paid an

amount under the expenses scheme that should not have been paid. Such an investigation may be launched by the Compliance Officer on his or her own initiative, at the request of IPSA, at the request of the MP concerned or in response to a complaint by a member of the public. If the Compliance Officer concludes that there has been an overpayment and that the sum involved has not been voluntarily repaid, the Compliance Officer may issue a repayment direction to the MP concerned. The MP may appeal to the First-tier Tribunal against the Compliance Officer's findings, the decision to issue a repayment direction, the amount to be repaid as specified in the repayment direction and/or any requirement to pay interest on the overpayment or to pay costs (paragraph 3 of Schedule 4 to the 2009 Act).

- (3) An MP may ask the Compliance Officer to extend the repayment period specified in a repayment direction. The MP may appeal to the First-tier Tribunal against the Compliance Officer's decision (paragraph 4(4)-(9) of Schedule 4 to the 2009 Act).
- (4) The Compliance Officer may issue a penalty notice to an MP as part of his or her investigation into a suspected overpayment of expenses. The power to do this arises where an MP has, without reasonable excuse, failed to provide information to the Compliance Officer or to comply with any requirement of a repayment direction. The MP may appeal to the First-tier Tribunal against the imposition of a penalty notice (paragraph 11 of Schedule 4 to the 2009 Act).

14. In each case an appeal must be brought within 28 days of the decision, subject to the Tribunal giving permission for a late appeal, and will be by way of a rehearing.

(4) The Tax Chamber Rules and possible changes

15. The Rules are divided into four parts. A short explanation is given below of each part and there is a discussion of possible changes to the rules in that part to allow for MPs' expenses cases and to make minor general improvements.

Part 1: Introduction

16. This part sets out the overriding objective of the Rules and gives definitions for terms that appear throughout the Rules. The overriding objective reflects the requirements for tribunal procedure rules as set out in section 22(4) of the TCE Act. The existing definition of "appellant" is wide enough to cover an MP exercising any of the rights of appeal identified above. Other definitions will need to be amended to ensure that the Compliance Officer is the respondent in (and only in) MPs' expenses cases. The question whether other respondents need to be identified in MPs' expenses cases is discussed under Part 3 below.

17. As regards the Tax Chamber rules generally, the opportunity arises to update the definition of 'HMRC'. The Borders, Citizenship and Immigration Act 2009 provides for a Director of Border Revenue to exercise the functions of HMRC in relation to customs revenue matters concurrently with HMRC. In the case of customs revenue matters dealt with by the Director of the Border Revenue, it is appropriate for the Director of Border Revenue to be the respondent. Accordingly it is proposed to amend the definition of 'HMRC' in rule 1(3) to take account of the role of the Director of Border Revenue.

Part 2: General powers and provisions

18. This part of the Rules sets out general powers and provisions that may apply at all stages of tribunal proceedings. It provides for case management of appeals, including applying for and the giving of directions. These powers can be used by the Tribunal with or without an application from the parties to the case.

19. Within this part are the Tribunal's powers to award costs. Those powers vary according to the category of case, and so are discussed in that context under Part 3 below.
20. Also within this part is rule 14, a provision which is commonly found in the rules for chambers of the First-tier and Upper Tribunals. It enables the tribunal to prohibit disclosure or publication of (a) specified documents or information relating to the proceedings or (b) any matter likely to lead members of the public to identify any person whom the tribunal considers should not be identified. These powers are rarely used, but can be of vital importance where disclosure of information or identification of an individual may put a person or the national interest in danger. Rule 14 does not deal with the question whether non-parties may generally obtain copies of documents lodged with the tribunal. This question is linked with the question of access to documents referred to at hearings, and is discussed in that context under Part 3 below.

Part 3: Procedure before the Tribunal

21. This part of the Rules sets out what happens from the time an appeal begins through to its end. It starts with the notice of appeal and time limits relating to it. A specific point arises as regards service of the notice of appeal. Under rule 20(5) when the Tribunal receives the notice of appeal it must give notice of the proceedings to "the respondent". Who should be "the respondent" in MPs' expenses cases? This raises the question whether the role of the Compliance Officer is similar to that of a lower tribunal (which would not normally be a respondent – e.g. appeals from Traffic Commissioners in the Upper Tribunal) or rather is to be regarded as akin to a regulator (e.g. appeals from decisions of the Office of Fair Trading, Information Commissioner, and Immigration Services Commissioner in the General Regulatory Chamber of the First-tier Tribunal).
22. The statute enables an MP to appeal the decision of the Compliance Officer in certain circumstances as set out above. The Compliance Officer although appointed by IPSA is an independent office holder and operates independently from the rest of IPSA. Moreover the Compliance Officer may act not merely at the request of IPSA,

but also on his or her own initiative, at the request of the MP concerned or in response to a complaint by a member of the public. It is the Compliance Officer's decisions, rather than IPSA's, which attract a right of appeal to the First-tier Tribunal. On balance these factors appear to point towards the Compliance Officer taking an active part in response to the appeal and being the respondent rather than IPSA or the person who made a complaint.

23. Where an appeal is against a review by the Compliance Officer of a determination of IPSA that a claim is to be refused in whole or in part under section 6 of the 2009 Act, the powers of the Tribunal include the making of an order that IPSA make any payments or adjustments that are necessary to give effect to the Tribunal's decision. If participation by IPSA were thought by the Tribunal to be desirable it could exercise its powers under rule 9 to add IPSA as a respondent.
24. Proposed changes to the definition in rule 1 accordingly would in general make the Compliance Officer the respondent in MPs' expenses cases.
25. Where a party wants to bring proceedings out of time rule 20(4) assumes that there is a power to extend time under rule 5(3)(a). In fact, however both in tax cases and in MPs' expenses cases the Tribunal's powers are to permit a late appeal and are conferred by statute. The Taxes Management Act 1970, the VAT Act 1994 and the Parliamentary Standards Act 2009 (as amended) all allow the Tribunal to give permission for an appeal to proceed even if it is lodged outside the time limit (28 days in the case of the 2009 Act). Rule 20(4) as currently drafted assumes an extension of time for filing the appeal will be granted rather than what the statutory provisions identify, namely allowing the appeal to proceed. The proposed amendments to rule 20(1) and 20(4) rectify this position and will apply generally, both to tax appeals and MPs' expenses appeals.
26. Part 3 then turns to the allocation of cases to categories and the procedure following allocation. Allocation to a category depends upon the nature and complexity of the case. Allocations to the Default Paper and Basic categories are set out in a Practice Direction (PD), 'The Categorisation of Cases in the Tax Chamber of the First-tier Tribunal'. Default Paper cases are generally appeals against fixed penalties and

Basic cases are informal cases where it is thought little case management will be required. It is not considered appropriate for MPs' expenses cases either to be dealt with on the papers without a hearing (Default Paper) or to proceed without a statement of case and without case management (Basic). Particular consequences may follow if a case is categorised as Complex. If it is thought right to retain those potential consequences in MPs' expenses cases it is proposed to amend rule 23(1) so that such cases must be categorised as either Standard or Complex. An alternative course could be to specify this in a revised version of the current Practice Direction. This might, however, seem inconsistent with the current approach under which the criteria for distinguishing Complex cases from Standard cases are set out in the Rules.

27. The criteria for deciding whether to categorise a case as Standard or Complex are set out in rule 23(4). It is not thought that these criteria need to be changed for MPs' expenses cases. However, consultees should note that categorisation as Complex has two important consequences under current rule 23(5).
28. First, if an appeal is allocated to the Complex category the current Rules provide that the taxpayer is given an important option as to the costs regime which will apply to the appeal. Rule 10(1)(c) (costs in Complex cases) applies unless the taxpayer 'opts out'. The 'opt out' takes the form of a written request made within 28 days of receiving notice that the case has been allocated as a Complex case. If the taxpayer does not 'opt out' then the tribunal's powers are widened, with the result that a "costs shifting" order may be made. This means that if successful in the appeal the taxpayer may be able to obtain an order that the taxpayer's costs of the appeal be paid by HMRC. Conversely, however, if the taxpayer were to be unsuccessful HMRC could ask for HMRC's costs to be paid by the taxpayer. Changes to rule 10(1) are proposed so that, if the appeal is categorised as Complex, MP appellants would have the option currently available taxpayers.
29. In all other categories, and in a Complex case if the appellant opts out, each party bears its own costs of the proceedings unless the tribunal makes an order in respect of wasted costs (under s 29(4) of the TCE Act) or if the tribunal considers that a party or its representative has acted unreasonably in bringing, defending or conducting the

proceedings. A question arises whether for MPs' expenses cases the ability to opt for a costs shifting regime should exist at all, and if so whether it should be confined to Complex cases.

30. Second, under rule 28 the Tribunal may, with the consent of the parties refer a Complex case to the President of the Tax Chamber to consider whether it should be transferred to the Upper Tribunal. Here a general question arises. There are two other jurisdictions where such transfer is possible: Charities and Information Rights. These involve transfer from the General Regulatory Chamber of the First-tier Tribunal to the Tax and Chancery Chamber (in Charities cases) and Administrative Appeals Chamber (in Information Rights cases) of the Upper Tribunal. In both these jurisdictions it is possible to transfer a preliminary issue rather than the whole case. This added flexibility may be particularly useful where a case involves one or more important points of principle along with other less important points. It is accordingly proposed to change rule 28 so that in the Tax Chamber, if the parties consent, there will be power to transfer preliminary issues as an alternative to transferring the whole case.
31. A specific question also arises whether for MPs expenses the possibility of transfer (either under the existing rules or with the change identified above) should apply, and if so whether it should be confined to Complex cases.
32. The next stage concerns the time within which a respondent must send or deliver a statement of case. Rule 25 currently allows the respondent 60 days to prepare a statement of case. This applies to both the Standard and Complex categories. 60 days was considered appropriate for HMRC to prepare a statement of case due to the number, nature and complexity of the appeals and the questions of law that arise. These factors will not be present to the same degree in MPs' expenses cases and it is accordingly proposed that in such cases a time limit of 28 days should apply.
33. There are then provisions for the filing of lists of documents by all parties and for listing hearings. Rule 32 generally requires that hearings be in public. Certain specific exceptions are identified. It is not thought that these need modification for MPs' expenses cases.

34. Also in Part 3 are provisions permitting the hearing of appeals in certain circumstances in a party's absence, and concerning the giving of decisions. These provisions do not, however, deal with access to documents. No specific provision is made in the Rules entitling non-parties to have access to documents referred to at a hearing. Nor, as noted earlier, do the Rules deal with access by non-parties to documents lodged with the Tribunal. No specific provision is made in the Rules entitling non-parties to have access to decision notices, full written findings and reasons, or any other communication between the tribunal and the parties. In all these respects the position is similar as regards other chambers of the First-tier Tribunal and the Upper Tribunal. An important question arises as to whether in these respects the position generally should be reviewed by the TPC. MPs' expenses cases may be thought, however, to differ from other cases – in particular as they are concerned with the payment of money out of public funds to elected representatives. For the purposes of the present consultation views are invited on whether access to documents in MPs' expenses cases should be the subject of specific provision, and if so whether that provision should be by way of amendment to the Rules or should take the form of a Practice Direction or Practice Statement. There is a need for consistency and proportionality in this regard. IPSA itself issued a consultation document on the publication of information – responses are due by 7 July. That document identifies numerous categories of information which may call for special treatment. The preferable course may be for the Chamber President, taking into account the responses to the present paper, to discuss with IPSA ways in which it could publish information about appeals adopting similar procedures to those that it adopts for information generally.

35. The Tax Chamber Rules make no provision as to whether hearings must be recorded, nor do they make provision as to the availability of transcriptions or other records of hearings. In those cases where hearings are recorded in the Upper Tribunal a Practice Direction by the Senior President enables a party to obtain a transcript, normally on payment of the requisite fee. In social security and child support cases in the Social Entitlement Chamber of the First-tier Tribunal a Practice Statement by the Senior President requires that a record of the proceedings at a hearing be made by the presiding member and be supplied to a party on request

within a specified period. In other cases in the First-tier Tribunal and Upper Tribunal, however, neither the rules nor any Practice Directions or Practice Statements deal with these aspects of proceedings. No rule change for MPs' expenses cases is proposed in this regard. Here, too, the preferable course may be for the Chamber President to consider whether any special provision is necessary for MPs' expenses cases.

Part 4: Correcting, setting aside, reviewing and appealing decisions of the Tribunal

36. This part applies to the process for the setting aside of decisions of the Tribunal, for applications for permission to appeal to the Upper Tribunal, and for the possible review by the First-tier Tribunal of its own decision following an application for permission to appeal. No changes are thought necessary in order to cater for MPs' expenses cases.

(5) Consultation Questions

37. The TPC would be interested in receiving your views on the proposed amendments to the Tax Chamber Rules to provide for MPs' expenses and in particular:

38. The overall position in relation to MPs' expenses:

(1) Do the draft Rules require any particular additions in order to accommodate MPs' expenses appeals? Please be specific about what addition is required and why it is needed.

(2) Are there any of the Rules as drafted that need amending in order to accommodate MPs' expenses appeals? Please be specific about why the amendment is necessary.

39. Specific Questions on proposed general changes and changes for MPs' expenses:

(3) In rule 1(3) the definition of respondent is to be amended to include the 'Compliance Officer' and consequentially a definition of Compliance Officer will be included. Points arising in this regard are discussed at paragraphs 21 - 23 above. Is the Compliance Officer the right person to be the respondent? If so, should the

Independent Parliamentary Standards Authority (IPSA) also be added to the definition, so that it will be also be a respondent in all MPs' expenses appeals?

- (4) Do you agree with the proposal **by way of general change** (see paragraph 17 above) to amend the definition of 'HMRC' in rule 1(3) to take into account the role of the Director of Border Revenue?
- (5) In rule 10(1) should the costs regime on Complex cases (see paragraph 28 above) apply to MPs' expenses appeals?
- (6) Should that costs regime in MP's expense cases only apply when a particular case is classified as Complex by the Tribunal, on application of a party, or at the instance of the Tribunal itself? (See paragraph 29 above).
- (7) It is proposed **by way of general change** (see paragraph 25 above) to amend rule 20(1) and rule 20(4) to enable the Tribunal to allow an appeal to proceed 'out of time' rather than to extend the time to file an appeal. Do you agree with this approach?
- (8) Do you agree (see paragraph 26 above) (a) that MP's expenses cases should be excluded from the Default Paper and Basic categories and if so (b) that this should be done by the proposed amendment in rule 23 rather than a Practice Direction?
- (9) Should the time allowed for the respondent in MPs' expenses cases to prepare a statement of case in rule 25(2) (b) be shortened (see paragraph 32 above) and if so do you agree with the proposed time limit of 28 days?
- (10) Do you agree with the proposal **by way of general change** to alter rule 28 (see paragraph 30 above) to allow, where the parties consent, the transfer to the Upper Tribunal of preliminary issues as an alternative to transferring the whole case?
- (11) Should the provision under rule 28 apply to MPs' expenses cases (see paragraph 31 above) and if so, should it be confined to complex cases?

(12) Should a specific provision be introduced for access to documents in MPs' expenses cases (see paragraph 34 above) or should the matter be left to the Chamber President?

(13) Should a specific provision be introduced on the recording of hearings and availability of transcripts in MPs' expenses cases (see paragraph 35 above) or should the matter be left to the Chamber President?

40. When answering the consultation questions, please keep in mind that the Rules should be simple and easy to follow and should not include provisions that contain unnecessary requirements or repeat requirements that are contained elsewhere. TPC must secure the objectives set out in section 22(4) of the TCE Act and it aims to do so in a consistent manner across all jurisdictions.

41. This consultation will run for a period of **six** weeks commencing from **28 June 2010** and closing on **9 August 2010**.

How to Respond

Please send your response by **to**

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Extra copies of this consultation can be obtained from using the above contact details or by visiting online at:

www.tribunalservice.gov.uk/tribunals/rules/tribunalprocedurecommittee.htm